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Nos. 73-1240, 73-1416

In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1240

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO,

Petitioner,

vs.

ANNE B. ZIPES, et al., DARLENE PRESTON, et al., DARLENE PRESTON, individually, et al., BONNIE PULSKAMP, et al.,

Respondents.

No. 73-1416

TRANS WORLD AIRLINES, INC. and AMERICAN AIRLINES, INC.,

Petitioners,

vs.

ANNE B. ZIPES, PATRICIA A. SANTINI, PAMELA J. DAILING, DARLENE PRESTON, BONNIE PULSKAMP, SUSAN PRASCUNAS, MARSHA JIMERSON, PHYLLIS STILL, ELIZABETH KORENGOLD, CHERYL ROSSI, and AIR LINE STEWARDS and STEWARDESSES ASSOCIATION, LOCAL 550, AFL-CIO,

Respondents.

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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STATUTES AND RULES

The Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e *et seq.* and Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C., are cited generally throughout this brief.

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STATEMENT OF THE CASE

Neither petition for certiorari presents any question meriting review by this Court.[1]

[1] By agreement with petitioners and the Clerk of this Court, respondents are filing a single brief in opposition to the two petitions for certiorari.

The thrust of both the Airlines' and the Union's petitions is that Title VII civil rights actions by individuals may be controlled and settled by a labor union, against the wishes of the individual plaintiffs, pursuant to that union's collective bargaining powers. They urge here, as they did in the Seventh Circuit, that accommodation of Title VII with the federal labor laws requires subordination of an individual's Title VII claim to the Union's majoritarian processes.

That odd contention was unanimously laid to rest on February 10, 1974 in *Alexander* v. *Gardner-Denver Co.*, ... U.S. ....., 39 L. Ed.2d 147, at 160, where this Court said:

> [An individual's Title VII claim] concerns not majoritarian processes, but an individual's right to equal employment opportunities. . . . Of necessity, the rights conferred [under Title VII] can form no part of the collective bargaining process since waivers of these rights would defeat the paramount congressional purpose behind Title VII.

Curiously, both the Union and Airlines asserted this claim of overriding union power only belatedly, after the first of two appeals to the Seventh Circuit in these actions. At the later settlement hearings it was finally revealed that the representation made in the settlement notices and to the appeals court that the "plaintiffs" wanted to settle was a blatant falsehood. The Union had never communicated with any of the named plaintiffs. Vol. II Supp. App. 164-5, 175-6, 178-9, 211, 213, 220, 226, 253, 269, 311, 315. Only then, when this fraud on the stewardesses and on the courts was unmasked, did the Union change its tack and arrogantly assert for the first time that for the good of the majority of its membership

it had the *power* and *duty* to impose settlements on the 600 unlawfully terminated stewardesses which, in effect, eradicated their civil rights claims.[2] The Union counsel urged that the named plaintiffs were only "nominal" parties, (Vol. II Supp. App. 450) and that he wasn't required to run a "popularity poll" as to his ideas. Vol. II Supp. App. 179.

An understanding of the settlement processes employed by petitioners is essential to restore these actions to proper perspective after petitioners' 55-page odysseys. Two pairs of settlements were entered into between the Union and the Airlines after these actions were filed. The first was an end run, ignoring Rule 23's notice and court-approval mandates. It settled only the claims of prospective dischargees (the currently-employed Union members) by eliminating the pregnancy-discharge practices. The claims of the 600 discharged stewardesses were left dangling. Although the Union was one of the class-action plaintiffs, and therefore invoked the class-action processes, it actually used the actions as a collective bargaining lever to gain benefits not for the named individual plaintiffs, who were kept ignorant of these initial agreements, but for the currently-employed Union members.

The second pair of settlements came nine months later, when the Union waived all back-pay claims and demands of the discharged stewardesses, including the named plaintiffs, for immediate reinstatement with accrued seniority. At no time prior to execution of the second pair of settle-

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[2] The unlawfulness of termination and refusal to rehire because of pregnancy is beyond question. See, *e.g.*, *Cleveland Board of Education* v. *LaFleur*, ... U.S. ....., 39 L. Ed.2d 52 (1974).

ment agreements were any of the individual plaintiffs informed of the pendency of those settlement negotiations. The reason for the secrecy is clear — those agreements were sell-outs. Thus the named individual plaintiffs, through usurpation by the Union of their prerogatives, were trapped in their own lawsuits and locked into unfavorable settlements. This was recognized by the court below: "[The Union] admittedly considered and to some extent protected the interests of the currently employed stewardesses in working out the settlement." 490 F.2d, at 640. The Union's counsel, in justifying his abandonment of the plaintiffs' claims for reinstatement, pleaded that "it would not be beneficial to *anybody's* interest" (emphasis added) to reinstate all the discharged stewardesses if such reinstatements would result in the layoff of currently-employed stewardesses.[3] Vol. II Supp. App. 155.

---

[3] Petitioners argue here that their secretly-negotiated settlements at least assured discharged stewardesses of a job. On the contrary, those settlements did *not* provide for reinstatement. Rather, they merely permitted them to apply for listing on preferential hiring lists. Thus, as *new* job openings were available, an applicant might be hired if she could meet those job requirements (including maximum weight standards) in effect at the time of her discharge. Seniority was restored only to the extent held at the date of discharge. (American's agreement provided for an additional 90 days.) There were further burdens of restrictive notice requirements. *See* Vol. I Supp. App. 44 *et seq.*, 48 *et seq.* In the current energy crisis, the airlines laid off thousands of employees. One's presence on such a hiring list is far from a guarantee of employment. In any event, the abuses of the settlement *process* are at issue here, and not the fairness of the settlements themselves. The court below did not reach the fairness issue.

The petitions are replete with misinterpretations, misstatements and misrepresentations. To treat each separately would lead us on a merry chase through a rabbit warren and further burden this Court. It is necessary, however, to touch on a few to demonstrate the petitioners' continuing desire to take full advantage of their illicit bargains, as well as to illustrate the manifest correctness of the decision below.

Seeking to bolster its claim of adequacy as the class representative, the Union asserts that it had long opposed the Airlines' pregnancy rules. In truth, the Union was *in pari delicto* with the Airlines in the perpetuation of these rules and in their embodiment in collective bargaining agreements (in the case of American) and in established personnel practices (in the case of TWA). It was not until March 1970, when the prospect of its liability as a *defendant* loomed, that the Union took any action. Vol. I Supp. App. 107-8. *See Waters* v. *Wisconsin Steel Works*, 427 F.2d 476 (7th Cir. 1970), *cert. denied sub nom. United Order of American Bricklayers & Stone Masons* v. *Waters*, 400 U.S. 911 (1970).

Contrary to the petitions, the Seventh Circuit did not ground its ruling of inadequate representation solely on conflicts in seniority. In the course of the actions, there emerged (1) direct conflicts of interests between the Union itself and the individual plaintiffs, (2) direct conflicts of interest between the currently-employed stewardesses (represented by the Union and its counsel) on the one hand, and the discharged stewardesses on the other, (3) commission by the Union and its counsel of acts hostile to the interests and rights of the discharged stewardesses, (4) lack of vigor and zealousness on the

part of the Union and its counsel in advancing the claims of the individual plaintiff—discharged stewardesses and those whom they represented, and (5) total preemption, to the exclusion of the named plaintiffs and their classes, of control of their litigation. On this last point the examination, by Mr. Pressman, of the Union's counsel, Mr. Feldman, at the settlement hearings is significant:

> Q. If the Union management . . . had informed you that they did not favor this settlement, you would not have approved it in your capacity as lawyer involved in the negotiation, would you?
>
> A. Of course not.
>
> Q. If . . . the Union management had been against the settlement, but the five individual members had been in favor of it, you would have done as the Union management requested you to do with respect to the settlement, is that not correct?
>
> A. Of course. (Vol. II Supp. App. 318)

The Union was serving two masters in a direct collision of interests: those of the named plaintiffs and class members who wanted their jobs back with full-accrued perquisites and back pay; and those of the present occupants of their jobs who might be displaced or disfavored if the dischargees prevailed. Faced with this the Union counsel abandoned, without any notice, the reinstatement claims of the discharged stewardesses. Vol. II Supp. App. 155. He frankly admitted his allegiance to the Union membership and acknowledged that he never considered seriously the claims for back pay and fully-accrued seniority. Vol. II Supp. App. 157-8, 163-4, 180, 324-6. When asked whether he considered it his duty to confer with the discharged stewardess-plaintiffs on the settlement negotiations, he responded:

> I considered just the opposite, that it was my duty to advise the Union, which was financing the lawsuit and handling the lawsuit . . . and I considered it my duty as the Union attorney, and the Union being the principal plaintiff, to deal through the Union. (Vol. II Supp. App. 315)

The Seventh Circuit was correct in concluding that the adequacy of a class representative, whether it be a union or not, is to be "tested and judged in the ordinary way." 490 F.2d, at 642. A union has no special sanctity in this regard, and tested by ordinary standards the Union and its counsel were woefully inadequate representatives.

At page 12 of its petition, the Union boldly misstates that "the Court [of Appeals] has ruled to the detriment of the rights of the *majority* of the pregnancy class who desired representation by ALSSA [the Union] and who *welcomed* the settlement achieved by ALSSA." (Emphasis added) There is nothing in or outside the record to support the Union's psychic claim of accolades. How could anyone, who never once communicated with the class members, in good faith purport to perceive the "goal of the majority?" Indeed, when that "majority" finally discovered the fraud being perpetrated on it through petitioners' secret collaboration, it rose up in justifiable outrage and vociferously objected and rejected the proposed settlements.[4]

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[4] At the settlement hearings it was shown that over 130 discharged stewardesses, including eight named plaintiffs, disapproved of the settlements. Vol. II Supp. App. 183-4, 186-8, 191, 206-7, 211-4, 217-27, 254-5, 358, 375. Only four approved. Vol. II Supp. App. 234-5, 312. These figures gain added significance considering that a very substantial number of the 600 discharged stewardesses did not receive the settlement notices. Vol. II Supp. App. 375.

Petitioners have compounded the injuries to the discharged stewardesses by their spurious appeals to this Court. They are consciously endeavoring to further delay the ultimate impact of the Seventh Circuit's decision on them and the currently-employed Union members.

At the settlement hearings petitioners clamored that time was of the essence in the settlements, and that the time element required the abandonment of virtually all of the claims of the classes. They now contend that it is the respondents who are not interested in speedy disposition of the actions. Nothing could be further from the truth. Respondents want and welcome their day in court —the sooner the better. Petitioners' proposed shortcut to the litigation of civil rights claims, by letting a self-appointed representative settle actions without consulting with or even communicating with its clients, would ill serve the administration of justice.

Contrary to petitioners' contentions, the respondents did not sit on their hands until the eleventh hour. The Seventh Circuit was correct in its conclusion that they have been vigilant in expressing their outrage at the representation afforded them by the Union and its counsel. 490 F.2d, at 643. The Union usurped the role of legal representative. Given the Union's imposed veil of secrecy, it is in no position now to complain that it took respondents some time to uncover the true facts.

ARGUMENT

The petitions should be denied for three traditional reasons:

1. No important question of federal law which has not been settled by this Court is involved;
2. There is no conflict between the Seventh Circuit's decision and decisions in other circuits;
3. The decision of the Seventh Circuit is correct and in perfect harmony with the decisions of this Court.

I

NO NOVEL QUESTION IS PRESENTED BY EITHER PETITION

The contrived questions presented by petitioners are founded on distortions of the record. As pointed out above, the overriding issue of union power was decided by this Court less than three months ago. *Alexander* v. *Gardner-Denver Co., supra.*

The Airlines here attempt to elevate the class determination ruling of the Seventh Circuit to a level of importance meriting this Court's review. It is not surprising that the Airlines vociferously attack the determination that the actions are properly maintainable under Rule 23(b)(3). In negotiating the settlements they set a (b)(2) classification as a condition precedent in order to have those settlements bind all class members. Apparently they still harbor the faint hope of obtaining reversal and reinstatement of those bargains so favorable to them.

However, this hope can form no sufficient basis for this Court's grant of their petition. The Seventh Circuit's

class determination ruling, expressly limited to the facts present in these actions, (490 F.2d, at 642-3) presents no question of sufficient importance to merit this Court's consideration.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS

The Union attacks what it claims to be "a confusing standard" created by the Seventh Circuit's rejection of the Union's contrived notion that an individual's rights under Title VII should be subordinated to the majoritarian processes of collective bargaining. It claims to "find" a conflict, where none exists, between the opinion below and that in *Western Addition Community Organization* v. *NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *cert. granted sub nom. Emporium Capwell Co.* v. *Western Addition Community Organization* (Docket 73-696, January 18, 1974).

Western Addition was not a Title VII action, nor did it involve the question of whether a labor union has the power to exclusively control Title VII litigation. The Union's assertion that the court in *Western Addition* "recognized the necessity of reconciling Title VII with a labor act covering the same subject matter" (Union petition, p. 13) is at best a misinterpretation. Any "reconciliation" suggested in that decision is not one which would limit the exercise of an individual grievant's Title VII rights. *See* 485 F.2d, at 927-8.

Rather, the *Western Addition* court observed that principles governing the enforcement of collective bargaining agreements are distinct and independent from principles governing civil rights litigation, an observation in perfect harmony with the Seventh Circuit, when it said (490 F.2d, at 641):

> Title VII, unlike the National Labor Relations Act and Railway Labor Act, does not create nor necessarily recognize powers of exclusive representation, either for those currently employed in the unit nor for a group which would include those claiming to have been unlawfully discharged. The situation is not parallel, and it does not seem to us that policy reasons militate in favor of similar status for the bargaining representative. An individual who claims to have been the victim of unlawful discrimination has the right to redress individually, whether the discrimination was an isolated act or a general practice.

The three supposedly "conflicting" decisions on the class determination issue cited by the Airlines are inapposite. In none of those were the relative merits of a Rule 23(b)(2), as opposed to a 23(b)(3), classification even considered.

III

THE DECISION OF THE SEVENTH CIRCUIT WAS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT

The Seventh Circuit correctly classified these actions under Rule 23(b)(3). Even the Union, much to the dismay of the Airlines, concedes this in its petition.

Respondents recognize that some civil rights class actions are properly maintainable under Rule 23(b)(2) where the overriding aim is sweeping declaratory and injunctive relief to eliminate existing discriminatory practices. Here, however, the record indicates the existence of varying individual claims for relief only from the present effects of discontinued discriminatory practices. These questions, in part, will have to be adjudicated in separate hearings. The Advisory Committee which drafted Rule 23 cautioned that where there are predominant issues other

than declaratory relief, the lumping together of class members under Rule 23(b)(2), without the right to opt out, would be inappropriate. *Notes of Advisory Committee on Rules*, Fed. Rules Civ. Proc. rule 23, 28 U.S.C.A. The Seventh Circuit correctly classified these as 23(b)(3) actions, recognizing the need to afford the discharged stewardesses the protections of that classification.

Petitioners argue that the opinion below is in conflict with the long line of "fair representation" decisions of this Court such as *Humphrey* v. *Moore*, 375 U.S. 355 (1964) and *Elgin, Joliet & Eastern Ry. Co.* v. *Burley*, 327 U.S. 661 (1946). They persist in confusing the Union's powers in collective bargaining under the federal labor acts with its entirely different role in civil rights litigation. *Alexander* v. *Gardner-Denver Co., supra.* The Seventh Circuit correctly preserved this important distinction.

The folly of this argument, and of the entire adequate representation issue raised here by petitioners, is conceded by the Union itself:

> Since this case involves a substantial civil right emanating from a federal statute, ALSSA believes that it would be improper to apply *Humphrey* v. *Moore* so as to empower a union to bind individual discriminatees who desire to pursue their rights alone. (Union petition, p. 18)

This concession of the applicability of Rule 23 to these actions, and of the sanctity and primacy of the individual's right to assert Title VII claims without the forced imposition of the majoritarian processes of collective bargaining, is nothing less than resignation by the Union to the validity of the Seventh Circuit's principal ruling—that, "except for the area of collective bargaining and its

necessary incidents, the union has no unique authority to compromise the rights of its members." 490 F.2d, at 642. That Court not only ruled that the Union had no *right* to manage the class actions, but also that it had in fact mismanaged them. In substance the Union only argues that the Seventh Circuit failed to recognize that the Union had the power to act as it did in representing the conflicting interests of different class members. The Union's own admission of lack of that power is dispositive here.

The Union has hoisted itself by its own petard. Since it concedes the essential correctness of the Seventh Circuit's rulings, it is left with no argument to advance to this Court in favor of issuance of the writ of certiorari.

CONCLUSION

Petitioners, in arrogant disregard of the civil rights of 600 women, already have delayed this litigation too long. Respondents seek only to have their day in court, represented by persons whose interests are not in conflict with those of respondents.

The decision of the Court of Appeals for the Seventh Circuit is correct. Respondents respectfully pray that the petitions for certiorari be denied.

Respectfully submitted,

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